IN THE

Supreme Court of the United States

October Term, 1961

No.....

THOMAS EISTRAT,

Petitioner,

vs.

NORTHERN LUMBER COMPANY, a partnership composed of Charles V. Clawson and Don Clawson; CHARLES V. CLAWSON, DON CLAWSON,

Defendants and Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California

THOMAS EISTRAT
1020 S. Almansor Street
Alhambra, California
In Propria Persona.

LONG BEACH REPORTER

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To the Honorable Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Thomas Eistrat, prays that a Writ of Certiorari issue to review the decision of the District Court of Appeal of the State of California, Second Appellate District, Division One, entered in the above-entitled case on March 20, 1961.

Citations to Opinions Below

The judgment and orders of the trial court are unreported and are included in the Certified Record. The decision of the State District Court of Appeal is printed in Appendix B. hereto, and is reported in 190 A.C.A. 326, 12 Cal. Rptr. 194.

Jurisdiction

The decision of the District Court of Appeal of the State of California was entered on March 20, 1961 (Cert. Rec., Appx. B, infra). Petition for Rehearing was denied on April 6, 1961 (Cert. Rec.). Petition for Hearing, After Decision of the District Court of Appeal, was denied by the Supreme Court of the State of California on May 16, 1961 (Cert. Rec.).

The jurisdiction of the Court is invoked under 28 U.S.C., Section 1257(3) (since a right is claimed under the Fourteenth Amendment of the Constitution of the United States).

Questions Presented for Review

1. Whether there has been discrimination against the federal courts and petitioner where there has been deprivation of property in contravention to the 14th Amendment of the United States Constitution, and where the state trial court received in evidence final orders of the federal court in bankruptcy adjudicating title to the property in petitioner—and then the state courts permit attack to repudiate and nullify that federal judgment?

2. Whether it is a denial of petitioner's rights under the XIVth Amendment of the United States Constitution for the highest California state court

in which appeal could be had to hold that a final bankruptcy court order in evidence *is not*, in respect to the matter directly adjudged, conclusive between the parties *and their successors in interest* by title subsequent to the commencement of the action, litigating for the same thing under the same title and in the same capacity, with actual or constructive notice of the pendency of the bankruptcy proceeding?

Constitutional Provisions and Statutes Involved

Art. I, Sec. 8, sub. 4; Art. III, Sec. 2; Art. IV; Art. VI of the United States Constitution and Amendment XIV thereto U.S.C. 1946 Sec. 1(10), Chap. 1. Title 11; and Sec. 11(a), Chap. 2, Title 11, Bankruptcy Act; and California Code of Civil Procedure, Sec. 1908. They are printed in Appendix A, hereto.

Statement of the Case

The Facts

This case is from a judgment for respondents during which only the issue of liability was tried in regard to the conversion of lumber taken from petitioner's property in 1951 during one Jones' bankruptcy proceeding. Respondents have only claimed rights to the lumber as flowing through the Jones bankruptcy proceeding.

It is admitted in evidence herein that:

> "Neither plaintiff or Elma Eistrat gave defendants written or other permission to acquire or purchase said timber or lumber."
>
> Page 2, C.V. Clawson affidavit, Exhibits 2 and 3 in evidence, RT 45: 10 to 46; 13; appellant's reply brief, pp. 1, 2.

Petitioner also on July 2, 1949 gave defendants written notice they would be held liable for conversion before they took any lumber (Exh. #1, RT 26, 19-24)

The trial court in this case found defendants took about 161,000 board feet of lumber from plaintiff's land during the Jones bankruptcy proceedings in July and August 1951 (CT 45: 17 to 46: 8; 104: 4-12). The trial court herein also found that defendants refused to deliver said lumber to plaintiff or to pay him, although he demanded such before commencement of this action (CT 44: 31-32; 45: 6-9).

The case was determined principally upon the question of title to the lumber.

In support of petitioner's claim to title to the lumber, the trial court received in evidence certified documents from the federal court showing adjudication of title in petitioner. These documents were: (1) Pltf's Exh. 5, being his petition in the bankruptcy court filed on September 29, 1949 claiming title to the logs, lumber and timber on his property on June 24, 1949 (the time of the filing of the Jones bankruptcy proceeding) and thereafter, (2) Pltf's Exh. 7, being the final order entered by the bankruptcy court thereon on October 1, 1951 granting the petition, and (3) Pltf's Exh. 6, being the findings of fact and conclusions of law in support of said federal judgment.

In support of the correct meaning of that federal judgment, petitioner also urged the reiteration of the meaning by the same Federal Judge, Honorable C. E. Beaumont, twenty-six months later in granting plaintiff judgment against the Massachusetts Bonding Company for cost of removal of a sawdust pile. By

order entered February 3, 1954 in said Jones bankruptcy proceedings it was held:

> "The claimants having prevailed in their petition to reclaim property as by decree and order of the court entered on October 1, 1951 decreeing that the bankrupt had no right, title or interest in or to the property described in said petition to reclaim property." (CT 56:20 to 57:3)

The state court permitted an attack upon said final federal judgment of October 1, 1951; and held contrary to the holding of the federal court in holding that adjudication by the federal court was for the *defendants*. In this connection the reported opinion and judgment of the District Court of Appeal states:

> "Plaintiff petitioned the court in the bankruptcy proceeding on September 29, 1949, to reclaim the property, and findings and an order dated October 21, 1950, were made with reference thereto. A petition to review that order was filed by plaintiff and an order was so made and a final judgment therein was made in about October 1951. Judgment in this case was for the defendants." (190 A.C.A. 326, 329) (Appendix "B", attached hereto)

The correct holding of the federal court granting the petition to reclaim in favor of petitioner herein was raised at every opportunity in the trial court (CT 71: 17 to 72: 13; 56: 4 to 58: 25); and in the lower appellate court in opening brief (pp. 3, 4, 7-10, 13); again in appellant's reply brief (pp. 6-11); again in petition for rehearing (pp. 7-9, 11); again in petition for rehearing by letter of April 7, 1961, copy at-

tached to petition for hearing in California State Supreme Court as Appendix "A", therein; and in petition for hearing in the Supreme Court (p. 3, and Appendix "A").

In said Appendix "A" petitioner also quoted from previous reported cases in which he was plaintiff (50 Cal. 2d 289; 181 ACA 69; 164 CA 2d 374; and 124 CA 2d 42) the previous statements of the California courts that the October 1951 federal judgment granted the petition to reclaim in favor of petitioner, and *not for the defendants.*

It can be said with candor that the reported opinion of the District Court of Appeal herein (App. "B") is a wrong that substantially mis-states the facts of the case, the federal judgment, the record in evidence, and the applicable law in substantial violation of petitioner's rights in contravention of the 14th Amendment of the United States Constitution.

The District Court of Appeal judgment is an attack repudiating and nullifying this final federal judgment by rehashing and erroneously stating matters out of context settled by the final federal judgment.

At every stage of the case in the courts below petitioner urged that respondents were conclusively bound by the federal judgment; and that denial by the state courts to give effect thereto in this case was a substantial violation of petitioner's rights in contravention of the 14th Amendment of the United States Constitution.

The Presentation of the Federal Question

The question of respondents being conclusively

bound by the federal judgment was raised before judgment in the trial court (CT 78: 3 to 79: 4); on motion for new trial (CT 62: 30 to 66: 23); in the District Court of Appeal in appellant's opening brief (pp. 8-10), his reply brief (pp. 4, 11, 14-16); his petition for rehearing (pp. 7-10, 14); his petition for hearing in the Supreme Court of California (pp. 2, 3, 7, 8).

The substantial violation of petitioner's rights in contravention of the 14th Amendment of the United States Constitution was also raised in the trial court on motion for new trial (CT 72: 15-22); in the District Court of Appeal in appellant's opening brief (pp. 6-7); in petition for rehearing by letter of April 7, 1961 (p. 4, 5-), copy attached to petition for hearing in Supreme Court as App. "A"; and in his petition for hearing in the Supreme Court of California (pp. 2, 3, 7, App. "A"—4)

The authority of the following cases was cited to the California State Supreme Court: *Acme Harvester Co. v. Beekman Lumber*, 222 U. S. 300; *Ex parte Baldwin*, 291 U. S. 610; *Hebert v. Crawford*, 228 U. S. 204; *May v. Henderson*, 268 U. S. 111; and *Whitney v. Wenman*, 198 U. S. 539.

Reasons for Granting the Writ

This court has stated in *Baltimore & Ohio Ry. Co. v. United States*, 298 U. S. 349, 366 that:

> "The equal protection of the laws which by the Fourteenth Amendment, no state can deny to the individual, forbids — the property of one individual — wrested from him for the benefit of another."

This court has heretofore required that effect be given in state courts to a plea of *res adjudicata* arising from a final decree of bankruptcy court (*Heiser v. Woodruff*, 327 U. S. 726, 733; *Stoll v. Gottlieb*, 305 U. S. 165; *Chicot County Dist. v. Bank*, 308 U. S. 371)

This court has also stated in *Stoll v. Gottlieb*, 305 U. S. 165, that a failure of a state court to give full faith and credit to a bankruptcy court judgment raises a federal question and confers jurisdiction upon the United States Supreme Court.

This court has stated in *Ex parte Baldwin*, 291 U. S. 610, that:

> "Upon the filing of a petition in bankruptcy the bankruptcy court acquires exclusive jurisdiction over the bankrupt and his estate . . ."

This court has also stated that it is also the established rule that jurisdiction once attaching is not lost by the fact that later on possession of the property passes to strangers without order of the court and while the bankruptcy proceeding is still active. That it is immaterial whether the change of possession has come about through voluntary transfer by the bankrupt or his agents, seizure by officers of the state courts, or unauthorized surrenders by officers of the bankruptcy court; that the jurisdiction continues and that the filing of the bankruptcy petition has the effect of an attachment and injunction, and the property is in *custodia legis* (*Whitney v. Wenman*, 198 U. S. 539; *Acme Harvester Co. v. Beekman Lumber*, 222 U. S. 300; *Hebert v. Crawford*, 228 U. S. 204; *May v. Henderson*, 268 U. S. 111).

Respondents only defense to this action for con-

version was the purported rights arising out of his dealings with Jones during the bankruptcy proceeding, having taken the lumber after commencement thereof with notice of petitioner's adverse claims.

> It was admitted and proven in evidence herein that "Neither plaintiff or Elma Eistrat gave defendants written or other permission to acquire said timber or lumber." (citation, supra)

The federal court in bankruptcy having by final judgment entered October 1, 1951 decreed in favor of petitioner that:

> "The claimants having prevailed in their petition to reclaim property as by decree and order of the court entered on October 1, 1951 decreeing that the bankrupt had no right, title or interest in or to the property described in said petition to reclaim property." (CT 56: 20 to 57: 3);

and said judgment having been received in evidence herein (Pltf's Exh. 5 and 6); and petitioner having urged that the state courts herein were conclusively bound thereby; and petitioner having urged in the state courts below that attack, repudiation and nullification of said federal judgment is in contravention of substantial rights of petitioner guaranteed to him under the 14th Amendment of the United States Constitution; it is respectfully submitted that there is good reason for writ of certiorari to be granted by the United States Supreme Court.

Conclusion

It is respectfully submitted that no state should be allowed to discriminate against a United States citizen

by collaterally attacking and repudiating a final federal judgment within the federal court's jurisdiction, thereby wresting his property from him in contravention of the 14th Amendment of the United States Constitution.

Respectfully submitted,

THOMAS EISTRAT

Petitioner

August 4, 1961

APPENDIX "A"

Constitutional and Statutory Provisions.

APPENDIX "A"

Constitutional Provisions and Statutes Which the Case Involves.

I

Article IV, of the Constitution of the United States, which reads as follows:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

II

That portion of Article VI of the Constitution of the United States which reads as follows:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

III

Article XIV, of the Amendments to the Constitution of the United States, which reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

IV

Article I, Sec. 8, Sub. sec. Fourth of the Constitution of the United States:

"To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States."

V

Article III, Sec. 2, of the Constitution of the United States:

"The judicial power shall extend to all cases in laws and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . ."

VI

U. S. C. 1946, Sec. 1 (10), Chap. 1, Title 11, Bankruptcy Act:

" 'Courts of bankruptcy' shall include the district courts of the United States and of the territories and possessions to which this title is or may hereafter be applicable and the District Court of the United States for the District of Columbia;"

VII

U. S. C. 1946, Sec. 11(a), Chap. 2, Title 11, Bankruptcy Act:

> "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—"

VIII

Section 1908, Code of Civil Procedure, Deering, 1953 Edition, page 741, which reads as follows:

> "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state or of the United States, having jurisdiction to pronounce the judgment or order is as follows:
>
> "1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration or the condition or relation of the person.

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

APPENDIX "B"

Opinions Below

[Civ. No. 24736. Second Dist., Div. One. Mar. 20, 1961.]

THOMAS EISTRAT, Appellant, v. NORTHERN LUMBER COMPANY (a Partnership) et al., Respondents.

[1] **Logs and Timber—Sales—Actions—Evidence.**—In an action involving alleged conversion of lumber, the trial court's finding that the lumber involved was made from logs which were cut by the lumber company prior to plaintiff's attempted revocation of its contract to cut was sustained by evidence where, though defendants had refused to purchase the lumber from the company unless the latter was going to be able to protect them from its creditors, and though the company thereafter filed a petition in bankruptcy, after which the purchase was made, nevertheless defendants did not advise the bankruptcy proceeding and there was no evidence of any collusion between them with reference to the making of the contract

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McK. Dig. References: [1] Logs and Timber, § 11(3); [2] Logs and Timber, § 8; [3] Judgments, § 429; [4] Logs and Timber, § 11(6); [5, 6] Logs and Timber, § 7.

to buy and sell the lumber, where the lumber company's title to the logs and lumber had been upheld in two other proceedings in which the same plaintiff had also been plaintiff, and where plaintiff himself testified that he saw a larger number of board feet of logs lying in the woods on a date two days prior to his attempted revocation of the lumber company's contract.

[2] **Id.—Sales—Validity.** Where a lumber company, after filing a petition in bankruptcy, sold certain lumber, the sale was valid even if the lumber was made from timber felled after the landowner's attempted revocation of the company's contract to cut, since the company was operating under control and supervision within the bankruptcy action.

[3] **Judgments—Res Judicata—Parties or Persons Concluded—Privies.** A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession or purchase.

[4] **Logs and Timber—Sales—Actions—Findings.** In an action involving alleged conversion of lumber which defendants had purchased from a lumber company after plaintiff gave notice of termination of the company's contract to cut timber on his land, the fact that plaintiff had filed, in the company's bankruptcy proceeding, a petition to reclaim his land, together with all logs, timber and lumber thereon, and that the court made order accordingly, did not establish that the attempted termination of the contract was effective, where the last purchase of lumber by defendants from the lumber company was prior to the filing of the petition, and even if the federal court found that all rights of the lumber company under the contract terminated on the date of such notice of termination, such finding was not necessarily binding on defendants, who were not parties to or represented in the bankruptcy proceeding and were not in privity with the bankrupt.

[5] **Id.—Sales—Notice of Termination of Agreement—Effect of Subsequent Claim in Bankruptcy.** Where a landowner, who had entered into an agreement to sell timber from his land, gave notice of termination of the agreement, the agreement was in effect reconfirmed when the landowner thereafter filed a "Proof of Claim" based on it in the purchaser's bankruptcy proceeding, notwithstanding that such claim was subsequently withdrawn.

[6] **Id.—Sales—Notice of Termination of Agreement—Effect of Subsequent Suit.** Where a landowner, having given a lumber company notice of termination of its contract to cut timber on

[2] See Cal.Jur.2d, Logs and Timber, § 11; Am.Jur., Logs and Timber, § 13.

his land, subsequently filed suit against the company and sought termination of the agreement and damages and caused an attachment to issue, that suit nullified the attempted termination.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fletcher Bowron, Judge. Affirmed.

Action for damages for alleged conversion of lumber. Judgment for defendants affirmed.

Thomas Eistrat, in pro. per., for Appellant.

Vincent Scott for Respondents.

FOURT, J.—This is an appeal from a judgment in favor of defendants in an action involving an alleged conversion of certain lumber.

The first cause of action set forth in the complaint is for conversion of 200,000 board feet of lumber for which the plaintiff claims damages of $40,000; the second cause of action is for the value of 200,000 board feet of lumber in possession of the defendants in the amount of $40,000. The Clawsons answered the complaint by a general denial and in effect among other things set forth as affirmative defenses that the lumber was owned by Jones Lumber and Mill Company, hereinafter referred to as Jones, and not by plaintiff; that payment for the logs from which the lumber had been produced had been made; that plaintiff was guilty of laches; that plaintiff was estopped from recovery by his conduct; that the issues involved have been decided against plaintiff in other actions and were res judicata and that plaintiff was estopped to pursue the action by reason of his election to pursue other remedies.

The plaintiff and his wife owned some timberland in Tulare County as community property and he acted for and on behalf of his wife as well as in his own behalf, and the conduct of either was the act and conduct of both.

On August 2, 1948, plaintiff made and entered into a "Timber Sales Agreement" with Jones, wherein plaintiff agreed to sell timber from his land to Jones. The contract provided among other things that the title to the timber passed to Jones when it was severed from the land and became logs, for which Jones was to pay $8.50 per thousand board feet of merchantable timber. Jones went onto the property under the provisions of the agreement, erected a sawmill and between August, 1948, and some time in November, 1948, cut between

125,000 and 500,000 board feet of timber. Said logs were later made into lumber by Jones.

On about October 10, 1948, plaintiff notified Jones that the contract was terminated; however on December 14, 1948, plaintiff filed an action against Jones in Tulare County for damages for an alleged violation of the contract and caused an attachment to be issued.

On June 21, 1949, defendants entered into a purchase and sale contract with Jones for certain lumber. During the negotiations for the contract Jones told defendants that he had some bothersome creditors and defendants refused to proceed further toward making a contract with him unless Jones was going to be able to protect the defendants from his creditors. Jones stated that he would consult with his lawyer about the matter and following his lawyer's advice Jones filed a petition in bankruptcy on June 24, 1949; a restraining order was issued against the creditors of Jones thereby enabling him to operate his sawmill and sell his lumber without interference.

Between June 21, 1949, and August 6, 1949, defendants purchased 161,022 board feet of lumber from Jones, an amount which is less than could be produced from 140,000 board feet of logs. Defendants paid Jones for all of the lumber received by them. Jones paid the plaintiff for the logs from which the lumber sold to defendants was made.

On August 12, 1949, plaintiff's wife filed a verified "Proof of Claim" in the Jones bankruptcy proceedings, wherein she set forth that Jones was liable to her for $8,250, under the written contract of August 2, 1948, and a copy of the "Timber Sales Agreement" was attached to the claim. That claim was subsequently withdrawn.

Plaintiff petitioned the court in the bankruptcy proceeding on September 29, 1949, to reclaim the property, and findings and an order dated October 21, 1950, were made with reference thereto. A petition to review that order was filed by plaintiff and an order was so made and a final judgment therein was made in about October 1951. Judgment in this case was for the defendants.

[1] Appellant now contends that there was no substantial evidence to support the findings of fact and that it was reversible error to deny plaintiff's motion for a new trial.

Appellant complains at great length about the defendants refusing to contract with Jones until they were assured that they would be protected from the creditors of Jones. The fact is that defendants did not advise Jones to go into any

bankruptcy proceeding and there was no evidence of any collusion between Jones and the defendants with reference to the making of the contract to buy and sell the lumber in question. Appellant asserts in effect that the contract was tainted and infected because of the Jones bankruptcy proceedings and that Jones' title to the logs and lumber was faulty. In *Eistrat* v. *Brush Industrial Lumber Co.*, 124 Cal. App.2d 42 [268 P.2d 181], the court said:

". . . on or about August 2, 1948, plaintiff entered into an agreement with Jones Lumber and Mill Company (hereinafter referred to as the vendee) by the terms of which plaintiff gave vendee the right to cut timber on certain property owned by plaintiff." [P. 43.]

"[1] First: *Does the evidence sustain the finding of the trial court 'that plaintiff had no right, title or interest in or to said lumber; that said defendant was the owner of said lumber, and refused and had the right to refuse to deliver said lumber, or any part thereof, to plaintiff'?*

"*Yes.* The evidence discloses that plaintiff entered into a contract giving vendee the right to remove certain lumber from property which he owned, and thereafter vendee did remove the lumber but did so in violation of certain provisions of the contract (this lumber was sold to defendants); that plaintiff knowing of the violation of the provisions of the contract waived any rights against defendants by (1) expressly telling them he would not hold them liable in any way for the alleged breach of contract by vendee (see evidence set forth in the footnote, *supra*; and (2) by instituting the action in Tulare County against vendee and obtaining the levy of a writ of attachment upon defendants for sums which it owed vendee. [2] The rule is established in California that one who obtains an attachment in pursuance of a contractual remedy is estopped to later pursue another remedy predicated upon an alleged tort arising from the same set of facts. (*Estrada* v. *Alvarez*, 38 Cal.2d 386, 391 [6] [240 P.2d 278]; *Steiner* v. *Rowley*, 35 Cal.2d 713, 720 [221 P.2d 9].)

"This rule is here applicable and since defendants purchased the timber from vendee under a valid contract, the above finding of the trial court was sustained by the evidence." [Pp. 44, 45.]

It would appear therefore that the particular matter of which the appellant complains has been litigated and Jones' title was upheld in an action in which the plaintiff here was also the plaintiff.

In another action in which the plaintiff here was also the plaintiff, namely *Eistrat* v. *Western Hardwood Lumber Co.*, 164 Cal.App.2d 374 [330 P.2d 629], it was stated:

"[4] As to whether Jones Company had title to the already cut timber it is clear both from the contract itself and the authorities that timber severed from the soil under the provisions of an agreement, license or permit, before the expiration or revocation thereof, becomes the personal property of the purchaser or licensee. He is vested with the rights incident to ownership of personal property and is entitled to remove it as his own (*Sorenson* v. *Jacobson* (1951), 125 Mont. 148 [232 P.2d 332, 26 A.L.R.2d 1186]; 54 C.J.S. § 29(c), Logs and Logging, pp. 730-731). [5] One who has felled lumber under a purchase agreement retains title to the lumber after the agreement has been revoked. (*Anderson* v. *Moothart*, 198 Ore. 354 [256 P.2d 257].)" [P. 379.]

The evidence in this case is sufficient to support the findings of the trial court to the effect that the lumber purchased by defendants from Jones was made from logs which were felled before the attempted or purported revocation of the "Timber Sales Agreement" on October 10, 1948. The finding reads as follows:

"XII

"That between the 2nd day of August, 1948 and the 10th day of October, 1948, certain timber was felled by Jones Lumber and Mill Company, or its successor Tom Jones, under said Timber Sales Agreement, and that subsequently thereto, approximately 161,000 board feet of lumber was milled from the logs of the timber so felled."

Eistrat himself testified that he saw about 500,000 board feet of logs lying in the woods on October 8 1948.

[2] However even if the timber was felled by Jones after October 10, 1948, and made into lumber sold to defendants between June 21, 1949, and August 6, 1949, the sale of such lumber was valid as Jones was operating under control and supervision within the bankruptcy action.

[3] Plaintiff asserts that the defendants are "privies" with Jones and stand in his shoes. By definition a privy is as follows:

"A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." Citing *Bernhard* v. *Bank of America*, 19 Cal.2d 807, 811 [122 P.2d 892].

[4] The only judgment with which we could be concerned in this case is based upon the petition of plaintiff to reclaim the property filed on September 29, 1949. The petition in that matter sets forth in part:

"'3. At the time of the filing of said petition by said debtor herein, said debtor had in his possession, and the Receiver now has in his possession, the following property belonging to your petitioner:

"'The Northwest Quarter (NW ¼) of Section Twenty-nine (29), Township Twenty-four (24) South, Range thirty-two (32) East, Mount Diablo Base and Meridian, together with the timber and lumber and logs located thereon.'

"And the prayer of said Petition is as follows:

"'WHEREFORE your petitioners pray that Vincent DiGiorgio, said Receiver, be directed to surrender possession to your petitioners of said property, and that your petitioners have such other and further relief as is just.'

"And the Order on Petition for Review recites as follows:

"'II. That the said THOMAS EISTRAT and ELMA EISTRAT are the owners of said real property and all of the logs, timber and lumber thereon and entitled to immediate possession thereof.

"'III. That the Trustee herein forthwith deliver over to said THOMAS EISTRAT and ELMA EISTRAT Possession of said real property and the logs, lumber and timber thereon.'"

It would appear that plaintiff petitioned only for the real property, timber, lumber and logs thereon and the court apparently ordered only that plaintiff was the owner thereof and ordered the receiver to deliver the real property, logs, timber and lumber in his possession to the plaintiff. The last purchase of any lumber by defendants from Jones was on August 6, 1949.

However even assuming the findings in the federal court as claimed by plaintiff, namely, that all rights of Jones in and to his "Timber Sales Agreement" of August 2, 1948, terminated on October 10, 1948, such would not necessarily be binding upon the defendants in this action. The defendants in this action were not parties to the bankruptcy proceedings nor were they in privity with Jones, who was a party thereto. Jones did not represent the legal interests or rights of the defendants in any proceeding, nor did any officer of the bankruptcy court represent the interests of the defendants. The defendants were for all intents and purposes strangers to the federal court proceedings. There could be no mutuality of

estoppel in this case. See *Eistrat* v. *Brush Industrial Lumber Co.*, 124 Cal.App.2d 42 [268 P.2d 181]; *Whitney* v. *City & County of San Francisco*, 52 Cal.App.2d 363 [126 P.2d 367]; *Bernhard* v. *Bank of America*, 19 Cal.2d 807 [122 P.2d 892]; Witkin, California Procedure, volume 3, page 1926.

[5] It must also be remembered that the plaintiff in effect reconfirmed the "Timber Sales Agreement" when Mrs. Eistrat filed the "Proof of Claim" in the bankruptcy proceedings on August 12, 1949, some six days after the last purchase of defendants from Jones. The subsequent withdrawal of the claim only indicates that the plaintiff determined to proceed upon another course.

The record demonstrates that the plaintiff was paid by Jones for the lumber the price agreed upon between them in their contract. Having accepted the full payment under the circumstances, he cannot now collect again from the defendants.

[6] With reference to the defense of estoppel defendants point up that after Jones had cut substantial amounts of timber into logs under the contract with plaintiff, the plaintiff attempted to terminate the agreement as of October 10, 1948, as heretofore set forth, even though the plaintiff had already received payment for a substantial portion of the logs so cut. The plaintiff filed suit against Jones in Tulare County and sought termination of the agreement and damages and caused an attachment to issue. That suit then nullified the attempted termination. See *Eistrat* v. *Brush Industrial Lumber Co.*, 124 Cal.App.2d 42 [268 P.2d 181].

The plaintiff's motion for a new trial was thoroughly considered by the trial court. We have read the proceedings and we think the trial court was proper in denying the motion of the plaintiff.

The judgment is affirmed.

Wood, P. J., and Lillie, J., concurred.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. _____

THOMAS EISTRAT,

Petitioner,

vs.

NORTHERN LUMBER COMPANY, a partnership composed of Charles V. Clawson and Don Clawson, CHARLES V. CLAWSON, DON CLAWSON,

Defendants and Respondents.

RESPONDENTS' BRIEF OPPOSING ISSUANCE OF A WRIT OF CERTIORARI

VINCENT SCOTT
5057 Wilshire Boulevard
Los Angeles 36, California

Attorney for Respondents

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No. _____

IN THE SUPREME COURT

OF THE UNITED STATES.

THOMAS EISTRAT,

Petitioner,

vs.

NORTHERN LUMBER COMPANY, a partnership composed of Charles V. Clawson and Don Clawson; CHARLES V. CLAWSON, DON CLAWSON,

Defendants and Respondents.

ANSWER TO PETITION FOR WRIT OF CERTORARI

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your respondents respectfully oppose issuance of a Writ of Certorari in the above entitled matter, and ask that the Petition

herein be dismissed, for the following reasons:

PRELIMINARY STATEMENT

Before presenting the argument in opposition to a Writ herein, certain misleading statements or distortion of fact set forth in Petitioner's 'Statement of the Case and Facts' must be corrected.

The statement that "The trial court herein also found that defendants refused to deliver said lumber to plaintiff or to pay him, although he demanded such before commencement of this action" (Page 4 of the Petition herein) referred to a Finding of the trial court that defendants refused to surrender certain lumber or pay Petitioner $40,000.00 as demanded in his original complaint. The actual findings of fact and conclusions of law of the trial court, after trial, held that Petitioner herein was not the owner of said lumber and that he had received payment therefor (Clk. Tr. p. 50, lines 11-15; p. 46, lines 15-19).

The opinion of the District Court of Appeal confirmed the findings, conclusions and judgment of the trial court in respect to the title and payment for said lumber as follows:

> "The record demonstrates that the plaintiff was paid by Jones for the lumber the price agreed

> upon between them in their contract. Having accepted the full payment under the circumstances, he cannot now collect again from the defendants."
> 190 A. C. A. 326, 333; Appendix B, Page 333 of the Petition herein.

On page 5 of the Petition herein Petitioner refers to a 'final federal judgment of October 1, 1951' and as authority for his contention that the trial court held said Order to be in favor of defendants (the Respondents herein) he sets forth certain language of the District Court of Appeal appearing in its opinion (190 A. C. A. 326, 329; Appendix B, Page 329 of the Petition herein). Respondents respectfully urge that petitioner has misconstrued both the nature and the effect of said statement, "Judgment in this case was for the defendants" contained therein (190 A. C. A. 326, 329; Appendix B, Page 329 of the Petition herein). This statement is merely a declaration by the reviewing Court of the judgment rendered by the trial court following its resume of the facts in the case to be reviewed, and immediately preceding its decision. Such statement refers to the judgment rendered in the case of Eistrat v. Northern Lumber Company and not the Federal Court Order made on or about October 1, 1951. Were this not so said statement would have referred to 'respondents' or 'The Bankrupt', rather than 'defendants', since there were no persons denominated as 'defendants' in the bankruptcy proceedings.

STATEMENT OF FACTS

On August 2, 1948, petitioner entered into a Timber Sale Agreement with one Jones, which provided among other things: "Purchaser agrees that no title or ownership of any timber shall pass from Seller until after the timber is cut" (Clk. Tr. p. 21, lines 18 and 19). Between August 2 and October 10, 1948, Jones cut timber under said agreement from which about 161,000 board feet of lumber was milled (Clk. Tr. p. 45, lines 26-31). On June 24, 1949, Jones filed a Petition in Bankruptcy under Chapter XI. Respondents purchased said 161,000 board feet of lumber from Jones during July and August, 1949, at which time they paid Jones for the same, and Jones in turn paid petitioner for the same (Clk. Tr. p. 45, line 26 - p. 46, line 19). Petitioner attempted to cancel this Timber Sales Agreement with Jones, prior to said bankruptcy, but by reason of his suit and attachment following such attempted cancellation the same was ineffective and said agreement was at all times operative (190 A. C. A. 326, 330; Appendix B, Page 330, of the Petition herein). In August of 1949 a Claim was filed by petitioner's wife, acting on their joint behalf, in the Jones bankruptcy, based on the Timber Sales Agreement, which was later withdrawn. On September 29, 1949, petitioner petitioned in the Jones bankruptcy to reclaim his property his prayer therein asking for the land and "timber and lumber and logs located thereon" (Clk. Tr. p. 48, lines 11-13) and an Order was made by the court that petitioner have a return of his land and "the logs, timber and lumber thereon" (Clk. Tr. p. 116, lines 22-29).

REASONS FOR DENYING THE WRIT

I

THIS HONORABLE COURT IS WITHOUT JURISDICTION

The pleadings in the State Court make no reference to any Federal question (Plaintiff's Complaint; Clk. Tr. pp. 1-3; Defendants' First Amended Answer; Clk. Tr. pp. 4-22).

The Findings of Fact and Conclusions of Law (Clk. Tr. pp. 43-50) and Judgment (Clk. Tr. pp. 51 and 52) make no reference to, nor decide, any Federal question.

It therefore appears that (1) no decision of any Federal question was necessary to the determination of the cause (2) no Federal question was decided and, (3) the judgment as rendered required no decision relative to any Federal question. The decisions are numerous that the necessary requisite for a review of a State Court decision is based on one or more of the foregoing.

Adams v. Russell, 229 U. S. 353, 33 S. Ct. 846, 57 L. Ed. 1224

Palmer v. State of Ohio, 248 U. S. 32, 39 S. Ct. 16, 63 L. Ed. 108

Chicago v. Maucher, 248 U. S. 359, 39 S. Ct. 108, 63 L. Ed. 294

Scott v. Platt, 137 P. 2d 975, 171 Ore. 379

No jurisdiction for review lies unless a decision by the State Court of a Federal question is necessary to determination of the cause.

Copperweld Steel Co. v. Industrial Comm. of Ohio, 65 S. Ct. 1006, 324 U. S. 780, 89 L. Ed. 1363

Gordon v. Scudder, 163 F. 2d 518, 68 S. Ct. 208, 332 U. S. 830, 92 L. Ed. 404

To confer jurisdiction for review either a Federal question must have been decided or the judgment could not have been given without deciding it.

Rooker v. Fidelity, 43 S. Ct. 388, 261 U. S. 114, 67 L. Ed. 556

Matthews v. Huwe, 46 S. Ct. 108, 269 U. S. 262, 70 L. Ed. 266

II

IT WAS UNNECESSARY TO DECIDE ANY FEDERAL QUESTION TO RENDER A JUDGMENT FOR RESPONDENTS HEREIN.

What petitioner is attempting to do in these proceedings is to recover a monetary judgment for lumber sold to respondents by Jones who at the time was operating under Chapter XI of the Bankruptcy Act. This lumber belonged to Jones before the bankruptcy proceedings were instituted on June 24th, 1949 (Clk. Tr. p. 45, lines 10-12), the timber from which said lumber was made having been cut prior to October 10th, 1948 (Clk. Tr p. 45, lines 26-31); therefore, the lumber never did belong to petitioner.

Furthermore, petitioner accepted payment for the lumber for which he is again seeking payment in these proceedings (Clk. Tr. p. 46, lines 14-19) (190 A. C. A. 326, 333; Appendix B, Page 333 of the Petition herein).

The above facts were adduced from the evidence before the court and construed according to the laws of the State of California, and under those facts respondents were entitled to judgment, aside from any Federal question, it being well established that this Honorable Court will not ordinarily review evidence and discuss specific facts unless an important Federal question is involved.

General Talking Pictures Corp. v. Western Electric, 58 S. Ct. 849, 304 U. S. 175, 82 L. Ed. 1273

Southern Power Co. v. North Carolina, 263 U. S. 508, 68 L. Ed. 413

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209

Silvert v. Pennsylvania R. Co., 197 F. 2d 371

III

THE STATE COURT NEITHER REPUDIATED NOR NULLIFIED A FEDERAL COURT JUDGMENT, BUT IN FACT GAVE EFFECT TO THE SAME.

That portion of the Order of the Federal Court with which we are concerned and as referred to by petitioner is as follows:

> "III That the Trustee herein forthwith deliver over to said THOMAS EISTRAT and ELMA EISTRAT possession of said real property and the logs, lumber and timber thereon." (ClkTr. p. 48, lines 23-27 and p. 116, lines 26-29).

Said Order was based on a Petition filed by petitioner which only asked for the return of his real property, "together with the timber and lumber and logs located thereon" (Clk. Tr. p. 48, lines 11-13). Therefore, the only matter before the Federal Court was to determine if petitioner was entitled to a return of his real and personal property located on his property at the time the petition was filed; and, the Order of the Federal Court above cited gave petitioner exactly what he petitioned for, and no more. The lumber purchased by respondents was sold and delivered during July and August of 1949 (Clk. Tr. p. 46, lines 4-8), while petitioners' Petition to Reclaim upon which the foregoing Federal Court Order was based was not filed until September 29, 1949 (Clk. Tr. p. 46, lines 21-23). Therefore, the conclusion of the trial court that both the Petition to Reclaim and the Federal Court Order based thereon referred to the property in the hands of the Receiver and Trustee was the only possible conclusion under the language of the Petition and Order and facts in the case (Clk. Tr. p. 50, lines 23-30).

CONCLUSION

Respondents respectfully submit that petitioner herein is attempting to recover damages for property for which he already accepted payment. That no Federal question has ever been raised, none is presented herein, none was decided and it is unnecessary to decide any Federal question to a final determination of this case. That the case was decided

on the basis of facts and evidence presented and construed under the laws of the State of California. That the petitioner herein should be dismissed and costs awarded to respondents.

Respectfully submitted,

VINCENT SCOTT

Attorney for Respondents.

OCT 12 1961
JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

October Term, 1961
No. 308

THOMAS EISTRAT,

Petitioner,

vs.

NORTHERN LUMBER COMPANY, a partnership composed of Charles V. Clawson and Don Clawson: CHARLES V. CLAWSON, DON CLAWSON,

Defendants and Respondents.

Petitioner's Reply Brief in Regard Petition for a Writ of Certiorari to the District Court of Appeal of the State of California

THOMAS EISTRAT
1020 S. Almansor Street
Alhambra, California
In Propria Persona.

LAW BLANK REGISTER

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IN THE

Supreme Court of the United States

October Term, 1961
No. 308

THOMAS EISTRAT,

Petitioner,

vs.

NORTHERN LUMBER COMPANY, a partnership composed of Charles V. Clawson and Don Clawson; CHARLES V. CLAWSON, DON CLAWSON,

Defendants and Respondents.

Petitioner's Reply Brief in Regard Petition for a Writ of Certiorari to the District Court of Appeal of the State of California

No party should prevail in a petition for certiorari before the United States Supreme Court by substantially misrepresenting the reasons for granting or denying the writ, the case, and the certified record. It is submitted the petition herein is scrupulously correct and proper, while respondents' reply brief is flagrantly not so!

I

RESPONDENTS' REASONS FOR DENYING THE WRIT ARE MISSTATEMENTS

Under "Reasons for Denying the Writ", each of respondents' three points would be good, were they not all based upon substantial misstatement of the facts in the certified record.

(a) Misstatement of No Jurisdiction

Respondents' brief states (p. 5):

> "THIS HONORABLE COURT IS WITHOUT JURISDICTION. The pleadings in the State Court make no reference to any Federal question" — "The Findings of Fact and Conclusions of Law" — "and Judgment" — "make no reference to, nor decide, any Federal question."

Respondents' brief ignores the many references to the presentation of the federal question cited on pages 6 and 7 of the petition herein.

In addition, respondents' above argument is a misstatement of the whole certified record relating to their argument. The certified record herein shows as follows omitted matter which substantially affect respondents' argument of no pleadings:

> "THE COURT: Well it is true that the order in this particular action numbered 6688 in bankruptcy is pleaded by way of a defense, and therefore I assume that it being known to the defendant the plaintiff was relieved of pleading it" (Rptr. Tr. 74:24 to 75:2) — "and then the defendant having pleaded the judgment in the

federal case, I take it it relieves the plaintiff of the necessity of pleading it." (Rptr. Tr. 76:2-5)

The certified record also refutes respondents' statement of "no reference to any Federal question" in the "Findings of Fact". The certified record shows Paragraph XV of the Findings of Fact of the state trial court herein referring to petitioner's petition to reclaim in the federal court, a part of the federal question (Clk. Tr. pp. 46-47). The certified record also shows Paragraph XVI of the Findings of Fact of the state trial court referring to the Findings of Fact and Judgment of the federal court, a part of the federal question (Clk. Tr. pp. 47-49).

The certified record also refutes the statement in respondents' brief of no reference to, nor decision of any federal question in the state trial court's Conclusions of Law. Paragraph IV of the state trial court's Conclusions of Law specifically refers to the federal judgment and shows the state court making a conclusion of law in regard to the federal judgment (Clk. Tr. p 50).

The state courts decisions as to the effect of the federal judgment are part of the important federal questions herein. The state courts have held that the federal judgment did not grant the petition to reclaim the property; while the federal courts have held that the petition was granted and that the bankrupt at no time had any right, title or interest in the property. In addition, the state courts have held that in any event respondents are not bound by the bankruptcy court adjudication of title to the property claimed by bankrupt, even though respondents took the property after com-

mencement of the bankruptcy proceeding and their only claims are through the bankrupt.

In the petition herein, as well as in all the state courts herein, petitioner has urged that nullification and repudiation of the final judgment as to title by the bankruptcy court was in contravention to the 14th Amendment of the United States Constitution — a most important federal question.

The certified record therefore does not support the argument on pages 5 and 6 of respondents' brief of no reference to nor decision of any federal question, and therefore no jurisdiction in the United States Supreme Court.

(b) Misstatement of No Federal Question

Respondents' brief states (p. 7):

> "IT WAS UNNECESSARY TO DECIDE ANY FEDERAL QUESTION TO RENDER A JUDGMENT FOR RESPONDENTS HEREIN".

Respondents took the lumber from petitioner's land after the June 24, 1949 commencement of the Jones bankruptcy proceeding (Clk. Tr. 45:17 to 46:8; 104:4-12); with notice respondents would be held liable in conversion before they took the lumber (Exh. 1; App. Reply Br. pp. 2, 3); and with never any permission from petitioner to take the lumber (Exh. 2); and respondents have refused to pay petitioner or return the lumber (Clk. Tr. 44:31-32; 45:6-9).

Respondents only defense was a deal solely between the bankrupt and respondents (App. Reply Br. pp.

2, 3). Respondents assert the bankrupt had title and not petitioner; however, the bankruptcy court held petitioner and not the bankrupt had title. The state courts herein have refused to give effect to the bankruptcy court's final order adjudicating the title in favor of petitioner.

The title to all the logs, lumber and timber on petitioner's land at the commencement of the bankruptcy proceeding on June 24, 1949 was tried in petitioner's petition to reclaim filed September 29, 1949. Such property included that taken by respondents herein.

The state trial court received in evidence petitioner's petition to reclaim said property filed in the bankruptcy court, together with the findings, conclusions of law, and final judgment of the federal court. A reduced size true copy of the petition and federal judgment exhibits in evidence is appended hereto.

The federal judgment was asserted by petitioner in all the state courts to be conclusive evidence that the bankrupt (and therefore respondents who only claimed under the bankrupt) had no right, title, or interest in this lumber. This lumber was part of that described in the petition to reclaim as being in logs or lumber on petitioner's land at the commencement of the bankruptcy proceeding.

Remington on Bankruptcy, Vol. 6. 1952 Ed., p. 115, cites the federal cases holding the doctrine of caveat emptor applies to anyone taking from anyone acting for a bankrupt's estate. Page 8 of the petition herein sets forth the authority of this United States Supreme Court for the rule that upon the filing of a petition

in bankruptcy the bankruptcy court acquires exclusive jurisdiction over the bankrupt and his estate; and that the failure of a state court to give full faith and credit to a bankruptcy court judgment raises a federal question and confers jurisdiction upon the United States Supreme Court.

Arguments by respondents about the lumber belonging to the bankrupt because he assertedly cut and paid for some of the timber before October 10, 1948, even if true (and they are not), are wholly immaterial to this action herein because the final judgment of the bankruptcy court cannot lawfully be subject to collateral attack.

The assertion in respondents' brief herein notwithstanding, it was necessary for the state courts to decide a federal question. The federal question was the holding and conclusiveness herein of the bankruptcy court's final judgment on petitioner's petition to reclaim the property.

(c) Misstatement as to State Court Giving Effect to Federal Court Judgment

Respondents' brief states (pp. 8-9):

> "THE STATE COURT NEITHER REPUDIATED NOR NULLIFIED A FEDERAL COURT JUDGMENT, BUT IN FACT GAVE EFFECT TO SAME."

Respondents above statement is incorrect.

The state trial court by its Conclusions of Law in paragraph IV (Clk. Tr. p. 50) concluded that the "Order of the United States District Court" — "on

or about September 27, 1951, had reference to the prayer of the petition and was a determination only that all moneys and property and things of value then in possession of the Receiver and Trustee in Bankruptcy proceeding, be delivered over to the petitioners therein, Thomas Eistrat, the plaintiff herein"—"LET JUDGMENT BE ENTERED ACCORDINGLY". That conclusion of law and judgment accordingly was prepared on respondents' stationary and is completely erroneous.

The erroneous position of the state trial court is reflected from paragraph VI of the federal judgment, where the federal court decrees the mill and machinery be retained by the bankrupt estate. Another error appears in the disregard of paragraph I of the federal judgment decreeing that the trustee and the bankrupt has no right to any of the lumber removed from petitioner's property. Another error appears in the disregard of paragraph V of the federal judgment decreeing that any claim against any person or persons for the value of logs or lumber removed from petitioner's property are the property of petitioner.

The state appellate court's opinion (appended to petition herein) followed respondents' reply brief therein. The state appellate court adopted the new erroneous position of respondents by stating in regard to the federal court judgment that plaintiff was only the owner of the lumber in possession of the receiver on September 29, 1949, and that plaintiff only petitioned for that property held by the receiver as of September 29, 1949 (190 A.C.A. 326, 332).

The erroneous position of the state appellate court

is further reflected in its opinion stating that even if the federal court found the bankrupt had no rights in the property, respondents herein would not be bound by the bankruptcy proceedings and were for all intents and purposes strangers to the federal court proceedings. (190 A.C.A. 326, 332).

The erroneous position of the state appellate court is reflected from the face of the petition to reclaim property (Exh. 5 in evidence and also reduced size appended hereto). Petitioner herein, and therein, petitioned the bankruptcy court for the return of all the logs, lumber and timber in the possession of the debtor Jones at the time of his filing his bankruptcy proceeding on June 24, 1949. Petitioner also alleged (lines 24 to 32, page 1, thereof) that the said property the debtor had was now (September 29, 1949) in possession of the receiver and that petitioner is entitled to immediate possession thereof.

Respondents reply brief before this United States Supreme Court also on page 9 misstates by omission said petition to reclaim property. Respondents omit that portion of the petition to reclaim property wherein petitioner petitioned for the return of all the logs, lumber and timber on his land on June 24, 1949 at the time the bankruptcy proceeding was filed.

As stated on pages 4 and 5 of the petition herein before the United States Supreme Court, the same federal judge, Honorable C. E. Beaumont, reaffirmed the October 1, 1951 judgment on the petition to reclaim — by again so decreeing in the judgment entered February 3, 1954 against the Massachusetts Bonding Company for cost of removal of a sawdust pile.

The February 3, 1954 Federal judgment states:

> "The claimants having prevailed in their petition to reclaim property as by decree and order of the court entered on October 1, 1951 decreeing that the bankrupt had no right, title or interest in or to the property described in said petition to reclaim property." (Clk. Tr. 56:20 to 57:3)

The property claimed by the bankrupt was the logs, timber and lumber on petitioner's land at the time of commencement of the bankruptcy proceedings on June 24, 1949. Petitioner petitioned to reclaim that property. The final judgment of the bankruptcy court granted petitioner exactly what he petitioned for.

There is no merit is respondents' assertions herein (pp. 8-9, their brief) that "the state court neither repudiated nor nullified a federal court judgment, but in fact gave effect to same". The state courts herein permitted collateral attack and repudiation of that federal judgment; decreed it was not binding on respondents; and then held for respondents in derogation of the federal judgment. Pages 6 and 7 of the petition herein reference presentation of the federal question in the state courts below.

CONCLUSION

Respondents took the lumber after commencement of the bankruptcy proceedings without any permission from petitioner.

Had the federal court adjudicated the title to the lumber in favor of the bankrupt, instead of petitioner,

the trial involving respondents in the state court would never have occurred. Had there been a trial under such circumstances, it would have been very brief — defendants could have offered a federal court judgment in favor of the bankrupt therein (had there been such a judgment), and obtained judgment without further ado.

Petitioner submits that at every stage of the case in the courts below petitioner urged that respondents were conclusively bound by the federal judgment; and that denial by the state courts to give effect thereto in this case was a substantial violation of petitioner's rights in contravention of the 14th Amendment of the United States Constitution.

Respectfully submitted,

THOMAS EISTRAT
Petitioner

October 8, 1961.

FILED

IN THE DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION,

In the Matter of the Estate of TOM G. JONES, also known as TOM JONES, doing business as JONES LUMBER & MILL COMPANY, Debtor.

No. 6686 In Proceeding for Arrangement

PETITION TO RECLAIM PROPERTY

TO WILLIAM A. McGUOIN, ESQ., Referee in Bankruptcy:

The petition of Thomas Eistrat and Elma Eistrat, respectfully represents:

1. On June 24, 1949, the above debtor filed a petition in this court proposing an arrangement with his unsecured creditors under the provision of Chapter 11 of the Act of Congress relating to bankruptcy.

2. On September 9, 1949, Vincent DiGiorgio was appointed Receiver of the property of said debtor, was qualified and is now acting as said Receiver.

3. At the time of the filing of said petition by said debtor herein, said debtor had in his possession, and the Receiver now has in his possession, the following property belonging to your petitioners:

> The Northwest Quarter (NW¼) of Section Twenty-nine (29), Township Twenty-Four (24) South, Range thirty-two (32) East, Mount Diablo Base and Meridian, together with the timber and lumber and logs located thereon.

4. Your petitioners are entitled to the immediate possession of said property.

5. Your petitioners have made demand upon said Receiver for the surrender of possession of said property and said Receiver has failed and refused to comply with such demand.

WHEREFORE your petitioners pray that Vincent DiGiorgio, said Receiver, be directed to surrender possession to your petitioners of said property, and that your petitioners have such other and further relief as is just.

THOMAS EISTHAT)
) Petitioners
EMMA EISTHAT)

By _____
Eckhart A. Thompson, Attorney for Petitioners

Robert E. Moock, Attorney for Petitioners

Eckhart A. Thompson, Atty for Petitioners

State of CALIFORNIA)
County of Fresno) ss.

HOWART A. THOMPSON, being sworn, says: That he is an attorney at law duly admitted to practice before all courts of the State of California and has his office at 810 Security Bank Building, Fresno, California, and is the attorney for petitioners in the above entitled action; that the facts of the above entitled action are within affiant's knowledge, and for that reason affiant makes this verification for petitioners herein; that he has read the foregoing petition, and knows the contents thereof; that the same is true of affiant's own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters affiant believes it to be true.

Sworn to before me this ____ day of _____, 1947.

_____
Notary Public in and for said County and State.

KISTRAT vs. NORTHERN LUMBER CO., et al

STATE OF CALIFORNIA, County of Los Angeles } ss. No. 63064

I, HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original

Plaintiff's Exhibit 5 (Petiton to Reclaim Property) filed June 12, 1956.

on file and of record in my office, and that I have carefully compared the same with the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court this 18th day of September 19 61

HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles

By S. Donnelly, Deputy.

12

FILED

SEP 27 1951

EDMUND L. SMITH, Clerk

By _____ Deputy Clerk

FILED

OCT 1 1951

JUDGMENT DOCKETED AND ENTERED

OCT 1 1951

EDMUND L. SMITH, Clerk

By _____ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

In the Matter of

TOM G. JONES, also known as TOM JONES, doing business as JONES LUMBER & MILL COMPANY,

Bankrupt.

No. 6689 In Bankruptcy

ORDER ON PETITION for Review of Order of Referee dated October 21, 1951.

THOMAS EISTRAT And ELMA EISTRAT having filed a petition for review of order of Referee herein, dated October 21, 1950, and having thereafter filed a motion for an order requiring the bankrupt herein and JONES LUMBER & MILL COMPANY, a co-partnership composed of TOM JONES, DANNY R. JONES and CLOVIS JONES, to be bound by such order or orders as the Court might make in respect to said petition for review, said THOMAS EISTRAT and ELMA EISTRAT appearing in their own persons, the Trustee and Receiver herein, VINCENT P. DI GIORGIO, appearing by KENNETH H. BATES, of Deadrich, Gill & Bates, the bankrupt and said partnership JONES LUMBER & MILL COMPANY appearing by ROLAND S. WOOLRUFF, and the Court having considered the proceedings had before the Referee and having received further evidence, and having made its written Findings of Fact and Conclusions of Law, and ordered that an order be entered herein in accordance therewith, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

I

That VINCENT DI GIORGIO, Receiver and Trustee herein, the bankrupt herein, TOM G. JONES, also known as TOM JONES, doing business as JONES LUMBER & MILL COMPANY, a co-partnership composed of TOM JONES, DANNY R. JONES and CLOVIS JONES, and each of them, has no right, title, interest, claim, lien or right to possession in, to or against the following described real property, to-wit:

The North West Quarter, Section 29, Township 24 South, Range 32 East, Mt. Diablo Base Meridian, also sometimes known as the Eistrat property

or any part thereof, or logs, lumber or timber thereon or any part thereof or in or to any of the logs, timber or lumber removed from said real property.

II.

That the said THOMAS EISTRAT and ELMA EISTRAT are the owners of said real property and all of the logs, timber and lumber thereon and entitled to immediate possession thereof.

III.

That the Trustee herein forthwith deliver over to said THOMAS EISTRAT and ELMA EISTRAT possession of said real property and the logs, lumber and timber thereon.

IV.

That the Trustee herein, VINCENT P. DI GIORGIO, deliver to said THOMAS EISTRAT and ELMA EISTRAT the sum of $1,381.64.

V

That neither the Trustee herein, nor the Receiver herein, nor said partnership, nor said bankrupt, has any present right, title or interest in or to any claim against BRUSH INDUSTRIAL LUMBER CO., SUNSET CABINET SHOP, or any

present claim against any other person or per[illegible]ons for the value of logs or lumber removed from said [illegible]roperty, and such claim or claims as may exist, if any [illegible]are the property of said THOMAS RISTRAT and EMMA RISTRAT.

V

THAT VINCENT F. DI GIORGIO as Trustee [illegible] of the Estate of TOM O. JONES, also known as TOM JONES, doing business as JONES LUMBER & MILL COMPANY, Bankrupt, is the owner and entitledto the possession of the mill and machinery of the said bankrupt located upon the real property escribed as:

The North West Quarter, Section 29, [illegible]ownship 24 South, Range 30 East, Mt. Diablo [illegible]ase Meridian, County of Tulare, State of [illegible]California, also sometimes known as the Ristrat [illegible]roperty.

VII

Any and all restraining orders, inc[illegible]din; among others, an order made by William A. McGuin, [illegible]eferee herein, on or about June 24, 1949, an order made here[illegible]n by Honorable Leon R. Yankwich on or about July 15, 1949, an[illegible]der made herein by Honorable Campbell E. Beaumont, Judge [illegible]rein, on or about April 25, 1951, in so far as said orde[illegible] or any of them restrain THOMAS RISTRAT, EMMA RISTRAT, [illegible] either of them, are hereby dismissed and discharged, a[illegible]ject to the right of the bankrupt herein to invoke the [illegible]unctive power of this Court to restrain any act on i[illegible]personam against the bankrupt abiding the resulting or [illegible]enial of a discharge of the bankrupt.

DONE IN OPEN COURT THIS 27th DAY OF [illegible]tember, 1951.

(Costs taxed by Court on Oct 10, 1951 at $ 67.

C. E. Beaumont

Judge of the Distri[illegible] Court of the United State[illegible]

EISTRAT vs. NORTHERN LUMBER CO., et al

STATE OF CALIFORNIA, County of Los Angeles } ss. No. 630646

I, HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original Plaintiff's Exhibit 7A (Order on Petition for Review of Order of Referee dated October 21, 1951) filed June 15, 1956,

on file and of record in my office, and that I have carefully compared the same with the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court this 18th day of September 19 61

HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles

By S. Kahagan, Deputy.